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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner,*

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR THE RESPONDENTS

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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BRIEF FOR THE RESPONDENTS

STATUTES INVOLVED

Petitioner cites 12 U.S.C. §91 (1970) as the statute involved, being that statute headed "Transfers by banks and other acts in contemplation of insolvency."

The issue advanced in this cause also involves the Fifth Amendment of the United States Constitution, which guarantees that no citizen will be deprived of his property without due process of law.

In addition to Section 91 of the National Bank Act and the Fifth Amendment of the United States Constitution, this case involves the Tennessee statute, "Sale Under Trust Deeds and Mortgages", *Tennessee Code Annotated* 23-2401—23-2404, which provides in pertinent part:

> *T.C.A.* 23-2401 (1873, mod. 1950). Notice of Application to enjoin sale.
>
> No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale, executed to secure the payment of a loan of money, unless complainant gives five (5) days' notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom said application for injunction is to be made. . ."
>
> *T.C.A.* 23-2403 (1873, mod. 1932) . . . After the reading of the bill in the hearing of the trustee or mortgagee, if he chooses to appear before the judge or chancellor, the said trustee or mortgagee may have the right to a delay of proceedings not more than ten (10) days, during which time he may file his answer before the same judge or chancellor.
>
> *T.C.A.* 23-2404 (1873, mod. 1932) Decree—The judge or chancellor may then, upon such bill and answer, hear said cause, at chambers, as upon motion to dissolve the injunction, his decision to be in a written decree, which decree, together with the bill, answer and exhibits, shall be enclosed in a sealed envelope, to the clerk of the court in which the bill is filed, said decree to constitute a part of the record in the cause, in conformity, to the terms of which, said clerk may take bonds from either party, or execute any other order as adjudged in said decree.

QUESTION PRESENTED

Whether a section of the National Bank Act, 12 U.S.C. §91 (1970) prohibits a state court from issuing an injunction against a national bank prior to a final judgment, temporarily restraining it from foreclosing upon the assets of a debtor in which the bank has a security interest.

STATEMENT

The question before this Honorable Court involves an interlocutory appeal only. Thus, the facts going to the merits are, for the most part, irrelevant. The pertinent facts are as follows:

1. Petitioner is a national banking association with its principal place of business, along with numerour branches, located in Nashville, Davidson County, Tennessee.

2. In May, 1973, Petitioner made a "permanent-construction" loan to Respondents evidenced by a $700,000.00 note, which is secured by a deed of trust encumbering the property, an office building. (A permanent-construction loan is one which, at time of completion of the improvements, is simply converted into a permanent loan with monthly payments.) (App. pp. 42-44, Exs. A, B). The named beneficiaries of the title insurance policy were both the permanent and construction lender. (App., p. 13).

3. On or about the same date, Petitioner, the Respondents and First and Mid-South Mortgage Company entered into a tri-party agreement whereby First and Mid-South agreed to purchase the note

and security instrument from Petitioner at completion of the construction. (App., pp. 15-21). The tri-party agreement prohibited Respondents from seeking permanent financing elsewhere. (App., pp. 19, 20).

4. At the time scheduled for closing in the summer of 1975, First and Mid-South refused to purchase the note from Petitioner as it had agreed, and, as its excuse, stated that certain conditions had not been met.

5. Petitioner did not pursue its remedy against First and Mid-South for breach of the tri-party agreement, but declared the note in default and proceeded to foreclose the property under its deed of trust. The principal balance due was $700,000.00, and the property was now valued in excess of $1,000,000.00.

6. On September 26, 1975, Respondents filed a complaint in the Chancery court of Davidson County, Tennessee, alleging that they were not in default on the loan and seeking to temporarily enjoin Petitioner from foreclosure pending a full hearing on the merits. (App., p. 2). The complaint and attached exhibits set forth the grounds upon which the injunction was sought. (App., pp. 2-31). The Chancellor did not grant an *ex parte* hearing as stated in Petitioner's brief, but struck that portion of the anticipatory order which Petitioner had prepared ordering a temporary restraint, and set the matter for a show cause hearing. (See App., p. 31). In doing so, the Chancellor followed the procedure required under Tennessee law. (See Statutes, *supra*).

7. At the show cause hearing October 8, 1975, the Chancellor found, upon the pleading, exhibits filed by Respondents, and extensive arguments of counsel, that Respondents had shown the existence of issues which should be determined upon a full hearing on the merits, and that Respondents would suffer irreparable harm if the foreclosure occurred prior to such full hearing. (App., pp. 56, 57).

8. A few days thereafter, Petitioner moved the Court to dissolve the injunction charging that under 12 U.S.C. §91, the court did not have jurisdiction to grant a temporary injunction prohibiting the foreclosure of property in which the bank has a security interest. The Chancellor found in favor of the Petitioner's position and entered an order on January 8, 1976, dissolving the injunction, but granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee. (App., pp. 68, 69).

9. The Supreme Court of Tennessee held that Section 91 of the National Banking Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing collateral and reversed the Chancellor's order. One of the justices did not participate in the majority opinion and one dissented. The Supreme Court of Tennessee, in its opinion, also found that "the United States District Courts in this State would have no jurisdiction to entertain this action . . . and that our State courts provide the only forum in which appellant may obtain relief." (App., pp. 70, 76).

10. This Court granted the petition for a writ of certiorari on January 10, 1977. 97 S.Ct. 731 (1977).

SUMMARY OF ARGUMENT

The theory of Petitioner attempts to interfere with the rights of courts, both federal and state, to protect citizens from wrongful foreclosure. Petitioner would thus deprive citizens of their fundamental right of due process before they can be deprived of their property.

Petitioner argues, under the authority of a section of the National Bank Act, 12 U.S.C. §91, that a national bank can foreclose properties of its debtors, and that the courts of our land cannot interfere to stop that sale by injunctive relief under any circumstances whatsoever.

National banks invite and solicit home loans and other loans by public advertisement, control the amount of the loan, the terms, the cost to the customer and everything else concerning those loans. In virtually every instance where a long term mortgage, construction loan and many other types of loans are involved, the bank requires the borrower to execute a deed of trust to his home or other piece of property to secure that loan.

Under the deed of trust in Tennessee, title to the property vests in the *trustee,* for the purpose of executing the trust, and a lien is thereby created against the property. *Harris* v. *Buchignani,* 285 S.W. 2d 108 (Tenn. S.Ct. 1955). The mortgagee is considered as a creditor, not an owner, and his only interest in the land is to secure payment of the debt. *Polston* v. *Scandlyn,* 108 S.W. 2d 1104, 21 Tenn. App. 252. A Trustee has the right to foreclose only in the event of a default in the terms of the security agreement.

Petitioner's theory, however, places the bank, through its officers, in the singularly favorable and unique position of replacing the courts in the event of controversy over default, and making an ex parte, self-serving determination of whether the debtor is, in fact, in default on the loan. Petitioner's theory is that regardless of how erroneous the decision of those bank officers might be, or the facts with which they are presented, even if wilfully fraudulent, with intent to deprive the debtor of his property, the courts cannot intervene and give the oppressed party injunctive relief pending a final hearing.

II.

The bank argues that its unique position of power over the assets of American citizens was given to it by a Congressional Act—12 U.S.C. §91 (1970), and the United States Supreme Court in cases construing that statute.

However, the statute itself is free from ambiguity. By its own heading, it regulates "Transfers by Banks and Other Acts in Contemplation of Insolvency." On its face, its purpose is to protect assets of an insolvent bank or bank contemplating insolvency from preferential treatment by one creditor over another. On its face, it prevents courts from issuing injunctions under such circumstances against a bank, or its property before final judgment. This meaning given this statute upon a reading of it would appear to be too clear for argument.

Petitioner argues, however, that the three United States Supreme Court cases of *Pacific National Bank of Boston* v. *Mixter,* 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888); *Earle* v. *Pennsylvania,* 178 U.S. 449 (1900); and *Van Reed* v. *People's National Bank,* 198 U.S. 554 (1905), extend 12 U.S.C. §91 to prohibit courts from temporarily enjoining foreclosure under any circumstances, for what-

ever reason, and regardless of whether the debtor would be irreparably damaged. Respondent submits that neither of those three cases is authority for reposing in national banks such broad and far-reaching power. While they did extend the statute to apply to dealings of national banks with creditors in cases where the banks are not yet insolvent or contemplating insolvency, they did not extend the statute beyond its intended purpose—to guard against preferential or wrongful disposition of the *assets* of a bank by its *creditors*. The United States Supreme Court in those cases *did not* hold that debtors of the banks could be deprived of their own assets without benefit of a court hearing.

The Tennessee Supreme Court, in holding that the national banks were not immune to injunctive powers of the Tennessee courts in wrongfully seizing or foreclosing a citizen's property, found that the banks could not seek to rely on State law so long as it was favorable to them, but not be bound by that part which accords relief to the citizens. (App., p. 76).

III.

Petitioner's argument that 12 U.S.C. §91 prohibits a State court from enjoining a national bank under any circumstances, if correct, would render the statute unconstitutional under the due process clause of the Fifth Amendment of the United States Constitution. Under Petitioner's theory, the bank determines default, without the debtor having an opportunity to be heard before an impartial tribunal—the bank is the tribunal. The bank, then, orders the trustee to foreclose, and the debtor is without a remedy to stop that sale. Also, the courts are without a remedy to prevent a citizen under their jurisdiction from being irreparably wronged. The sale is held,

and the property is gone. Under the deed of trust, a lender requires, as did the bank in this case (App., p. 43, Ex. B), that the debtor waive his equity of redemption. That waiver required by the bank was under the same deed of trust the bank now seeks to foreclose under its own determination of default.

The position the Petitioner takes in this cause is one which clearly deprives a citizen of due process of law. At the time of sale, his property is gone without a hearing. *Fuentes* v. *Shevin*, 92 S.Ct. 1983 (1972), 407 U.S. 67, 32 L.Ed. 2d 556. The fact that the injured party can still have a final hearing and possibly recover monetary damages, does not operate to undo the fact that the arbitrary taking that was subject to due process has already occurred. *Fuentes, supra*, at p. 1994. The United States Supreme Court has not embraced the general proposition "that a wrong may be done if it can be undone." *Fuentes, supra*, at p. 1994.

ARGUMENT

I.

A FINANCIAL INSTITUTION, NATIONAL BANK OR OTHERWISE, IS NOT ABOVE THE LAW AND CANNOT FORECLOSE PROPERTIES AT ITS WHIM, WITH NO FEAR OF COURT INJUNCTIVE INTERFERENCE.

Petitioner argues that any mortgagor who mortgages his real estate with a financial institution cannot avail himself of court protection by means of injunction if that bank wrongfully attempts to foreclose, provided, of course, the bank is a *national bank* rather than any other kind of financial institution.

A. National Banks Invite and Solicit Home Loans, Construction Loans and Other Collateralized Loans, for the Purpose of Making a Profit.

National banks throughout the country, and in particular in Tennessee, have established mortgage divisions which, for a profit in the form of brokerage fees and interest charged to the borrower, have chosen to engage, on a wholesale basis, in lending money to citizens for the purchase of residences, apartments, shopping centers, office buildings, and, in general, improvements and businesses of all types. For a profit, the banks have chosen to engage, on a wholesale basis, in lending money for the construction of many of those same improvements.

The bank advertises its wares, i.e., that it has money available for home loans or construction loans, etc., at lower interest rates, or lower brokerage fees or closing costs, and the public responds. For example, an individual desiring to purchase a home makes application for a permanent loan, normally payable monthly for twenty-five (25) to thirty (30) years.

1. The national bank dictates the terms of the note and requires that the borrower collateralize the loan with real estate, by means of a deed of trust.

The borrower is totally at the mercy of the lender as to the terms of the loan, i.e., how much interest rate, brokerage, origination fee and other closing costs. In fact, the lender makes the determination as to how much money to lend, and for how long a period. However, the borrower is required to mortgage his real estate, whether it be home or other type improvement, in its entirety. The instrument used to effect that transfer in Tennessee and

many other states is a deed of trust. This, of course, is an instrument by which a *non-judicial* sale of the property can be held by the trustee named in the instrument.

2. Bank has no ownership of property under a deed of trust in Tennessee—It is held as security by a trustee and only he can divest the borrower of title.

Under the deed of trust, legal title to the property vests in the *Trustee*. *Harris* v. *Buchignani*, 285 S.W. 2d 108 (Tenn. S.Ct. 1955).

Writing for the Supreme Court of Tennessee, Justice Burnett clearly stated the Tennessee law regarding title and property under a deed of trust and foreclosure sale by a trustee:

> "In this State the mortgage on the property in question or trust deed as we denominate it vests the title to the land described in the trust deed in the trustee and when there is a default under the terms of this trust and this is foreclosed, the deed of the trustee to the purchaser under this foreclosure gets good title thereto and such a deed is a proper link in its chain of title." *Harris, supra,* at p. 111.

Such legal title vests in the trustee, however, only for the purpose of executing the trust. 59 C.J.S., Mortgages, §196.

Under Tennessee law, all mortgages and trust deed, however drawn, are deemed in equity as mere securities, and such conveyances constitute mere liens. *Walker* v. *Wood*, 213 S.W. 2d 523 (Tenn. Ct. of App., cert. denied, June, 1948). The mortgagee is considered as a creditor, not an owner, and the only interest he has in the land,

consists in a lien or security for the payment of his debt. *Polston* v. *Scandlyn,* 108 S.W. 2d 1104, 21 Tenn. App. 252.

The Trustee is authorized under that trust instrument to hold foreclosure sale *only if* the borrower defaults in the terms of the trust instrument or the note securing the trust instrument. 59 C.J.S., Mortgages, §494, p. 776.

If there is no default in the terms of the mortgage, there can obviously be no foreclosure by the Trustee. 59 C.J.S., Mortgages, §494, *supra.*

At the foreclosure sale, a third party will bid in the property, or, if not, the bank will bid it in. *Only then* does the trustee convey to the bank and *only then* does it obtain legal title. No notice is required to foreclose other than the usual twenty (20) days' advertisement in a newspaper for three (3) consecutive weeks (as in the case at hand), which in Davidson County, Tennessee, is exclusively a legal publication. (See App., p. 43, Ex. B) *T.C.A.* §35-501.

Virtually all foreclosure sales are held free of the quity of redemption as deeds of trust in Tennessee contain a clause whereby the mortgagor waives his right to equity of redemption. (App. 44, Ex. B).

Once the indebtedness is fully paid, title revests in the borrower, and the holder of the note is required by Tennessee law to release the lien of the deed of trust on the courthouse records. *T.C.A.* §64-2501. After payment, the deed of trust can never be set up against the borrower, either in law or in equity. *Carter* v. *Taylor,* 40 Tenn. 30, 3 Head. 30.

B. Petitioner Argues That a National Bank Exclusively Makes the Sole, Self-Serving Determination of Default, Even If Erroneous or Fraudulent, So As to Trigger Foreclosure, With No Interference or Fear of Interference by the Courts, Even If the Borrower Is Irreparably Damaged.

Many controversies have arisen and will continue to arise, between a lender and a borrower, as to whether a loan is in default, and whether foreclosure of the property is justified. Yet, the position of the Petitioner is that if the lender is fortunate enough to be a national bank, rather than a Federal Savings and Loan Association, or any other financial institution, then the bank shall make the sole determination as to whether the note is in default. If, for example, payments have been made by a borrower and credited by the bank to the wrong account, and the bank proceeds to foreclose by giving twenty (20) days' notice in small print in a legal newspaper, the borrower, even if he is fortunate enough to run across that advertisement, is completely helpless to stop foreclosure. Petitioner argues that not only is the borrower helpless, the courts are also helpless, as the banks have chosen to foreclose, and must sit back and watch that homeowner's lifetime investment be sold. Petitioner argues that even if foreclosure is had by a scheming, unscrupulous and cunning banker, even to the extent of fraud against the property owner, the courts are still unable to stop that sale. Petitioner asserts, however, that the property owner is not hurt, as he can ultimately recover damages for the loss of that homeplace, or that farm, or that office building, or that business. Petitioner assumes first that money will replace every loss—that irreparable injury never exists. Petitioner assumes further that true damages are always admissible, never inadequate, and can always be proved.

Petitioner further assumes that all injured parties can afford to pay the large legal fees and costs necessary to seek final legal redress. Respondent submits that a large percentage cannot.

Acts which destroy or result in a serious change of property, either physically or in the character in which it has been held or enjoyed, have been held to do an irreparable injury. 43 C.J.S., Injunctions, §24, p. 448.

In the case of *Jones* v. *Thomas*, 296 S.W. 2d 646 (Tenn. 1955), the court found that the mortgagee had purchased property at a foreclosure sale in fraud of the mortgagor. However, the property had been sold to a third party. Therefore, the only damages recoverable by the defrauded party were the value of the mortgagor's equity in her home at date of sale. Obviously this type of monetary remuneration can never adequately pay for the replacement of a valued piece of property, or business of the mortgagor.

C. Petitioner Argues That National Banks Are in a Position Unique From Any Other Mortgage Lender or Any Other Entity Because of 12 U.S.C. §91.

Petitioner's argument clearly places a national bank in a unique position, one not enjoyed by any other institution or entity. For example, assume that two homeowner-borrowers sought injunctions against two different lenders for wrongful foreclosure in the same court on the same date. One lender is a Federal Savings and Loan, the other, a national bank. The court finds irreparable damages in both cases, and grants the injunction in the first case, but does not in the second case because the lender is a national bank. One homeowner loses his homeplace, the other does not. Such a situation is absurd and most

assuredly deprives both the homeowner and the Savings and Loan Association of equal protection under the law, hereinafter more fully discussed.

Take further the soldier who invokes protection against mortgage payments and foreclosure under the Soldiers and Sailors Relief Act, Civil Relief Act of 1940, 50 U.S.C.A. App. §§510 et seq. Is a national bank immune from injunction if it ignores the Soldiers and Sailors Relief Act and proceeds to foreclose? Likewise, assume an individual contemplating bankruptcy mortgages his property with a national bank within four (4) months of filing petition in bankruptcy, and assume that it is deliberately to defraud creditors. He defaults on his payments, and the bank proceeds to foreclose. Is the bankruptcy court prohibited from enjoining the bank under any circumstances? Petitioner's answer to both these questions would be in the affirmative, as the cases are clear that the injunctive relief prohibited by 12 U.S.C. §91 is applicable against Federal Courts as well as state courts. *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888); *Bachman* v. *First Mechanics Nat. Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J. 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F. Supp. 108 (1971).

II.

THE PURPOSE OF 12 U.S.C. §91 IS TO SECURE EQUALITY OF DISTRIBUTION OF ASSETS OF AN INSOLVENT BANK AMONG ITS CREDITORS, AND NOT TO SERVE AS A LICENSE FOR A NATIONAL BANK TO WRONGFULLY SEIZE ASSETS OF ITS DEBTORS.

It is Petitioner's argument that the enviable, all-powerful and unique position of a national bank previously dis-

cussed comes about as a result of a Congressional Act, in particular 12 U.S.C. §91 (1970) of the National Bank Act. This is a statute which clearly, by its own terms, provides regulation in regard to transfers by banks and other acts *in contemplation of insolvency.* There is no way that meaning can be misinterpreted. It is *plain, on its face, and free from ambiguity,* to any reader. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. 12 C.J.S., Statutes, §322, p. 557. To interpret this statute to mean that it enjoins a bank from foreclosure under any *circumstances* whatsoever is to add to the meaning beyond all bounds of reason. Congress would not and did not intend to give the banks a license to run roughshod over citizens so that even the judicial system is helpless to intervene. Petitioner argues that, under 12 U.S.C. §91, the judicial system must sit idly and helplessly by in the face of *whatever action* a national bank chooses to take against a citizen, whether foreclosure of his property or any other act, and wait until that citizen can get a *final* hearing in court. By then, of course, the action is taken, his property is gone, and it is, quite simply, too late.

The purpose of that statute was clearly to guard against wrongful or preferential disposition of assets of banks known to be or about to become insolvent, and to secure equality of distribution of the assets of an insolvent bank among its creditors. *Uhl* v. *First National Bank and Trust Co. of Kalamazoo,* 24 F. Supp. 275 (Mich. 1935); *First National Bank* v. *Colby,* 21 Wall. 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court,* 301 P.2d 64 (Cal. App. 1956); *Mechanics Universal Joint Co. et al.* v. *Culhane,* 57 S.Ct. 81, 299 U.S. 51 (1936). In the *Culhane* case, in 1936, Justice Brandeis interpreted 12 U.S.C. §1931 as follows:

> "One of the objects of the national bank system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure . . . To that end R.S. §5242, 12 U.S.C. §91 (12 U.S. C.A. §91), prohibits preferential payments."

The purpose of 12 U.S.C. §91 was obviously clear in the mind of Justice Brandeis—a just and equal distribution of the assets of a national bank among *creditors*—not a license to injure, by fraud or by simple error, its *debtors* by taking away their property without court interference.

A. United States Supreme Court Decisions Have Not Extended 12 U.S.C. §91 to Mean That Individual Citizens Cannot Invoke Injunctive Relief to Protect Their Own Property Against Wrongful Foreclosure by a National Bank.

It is an uncontroverted fact that Petitioner is neither insolvent nor remotely contemplating insolvency. However, Petitioner argues that three United States Supreme Court decisions effectively extended that statute, and removed altogether the remedy of injunction against a national bank under any circumstances whatsoever, regardless of degree of culpability, regardless of degree of damage to the borrower and regardless of whether the bank was insolvent or contemplated insolvency. Respondent respectfully submits that such was not the holding of those cases; nor was it the intention of the court in either of those cases to give to national banks a license to make judicial

and self-serving decisions in dealing with its debtors in literally any case.

1. The Mixter Decision.

The first case is *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888). This case dealt exclusively with an attachment against bank funds. The bank owed Mixter Fifteen Thousand Dollars. Mixter began a suit by attachment to try to recover the monies due him. There were, at the same time, other creditors of the bank who were attempting to attach. While the bank was not *insolvent*, it was having difficulties with creditors, and the bank would clearly be injured if an attachment issued prior to final judgment. Thus, we are brought to the finding of the court that the bank did not have to be actually insolvent or contemplating insolvency for Section 91 to apply, and the language that "The remedy is taken away altogether and cannot be used under any circumstances." *Mixter, supra*, p. 727. This case, however, dealt with the bank's *creditors*, not its *debtors*, as is true in the case at hand.

While the *Mixter* case did interpret the statute to apply to dealings with creditors in cases where the banks are not yet insolvent or contemplating insolvency, it *did not* extend the case beyond its intent—to guard against preferential or wrongful disposition of the assets of banks by their *creditors*.

Petitioner interprets certain dicta of the court in the *Mixter* case to mean that the court held that under no circumstances whatsoever can a state court or federal court enjoin a national bank. The court did not have before it the question of a bank's dealings on an ordinary day-to-day basis with its debtors and the attempt by those

debtors to preserve their own assets from being wrongfully sold pending a final hearing. To the contrary, the court was concerned with preserving the assets of the bank pending a final hearing.

Respondent would point out that the property conveyed under a deed of trust is simply held under a trust agreement until such time as there is a determination that the borrower is in default on his loan. Pending that period, the property is *not* an asset of the bank—it is simply collateral held under a trust agreement and subject to the terms of that trust. *Harris* v. *Buchignani, supra*; *Walker* v. *Wood, supra*; *Polston* v. *Scandlyn, supra*.

2. The Earle Decision.

The second of the Supreme Court cases cited by Petitioner is the case of *Earle* v. *Pennsylvania*, 178 U.S. 449 (1900). In that case the Defendant obtained judgment against one James Long for Thirty-One Thousand Four Hundred Ninety-Nine and No/100 ($31,499.00) Dollars. A writ of attachment was issued against Chestnut Street National Bank as garnishee on October 28, 1897. December 15, 1897, a rule was entered for judgment against the bank as garnishee. On December 23, 1897, the bank suspended payment of its obligations and, by order of the United States Comptroller, closed its doors to business. On January 29, 1898, Earle was appointed receiver, who then attacked the previous attachment as null and void for want of jurisdiction under §5242, Revised Statute of the U.S. (12 U.S.C. §91). The court found that an attachment sued out against the bank as garnishee is not an attachment against the bank *or its property* within the meaning of that section. Justice Harlan writing for the court, stated clearly that §5242 is to be construed in connection with transfers, etc. of a bank made in contemplation

of an act of insolvency. On page 917 of that opinion is the following language:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in §5242, 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof,' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of §5242, an attachment sued out against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others." 178 U.S. at 453, 454.

Although repetitious, it should be noted here, again, that a borrower's property, held under a deed of trust, is *not* an asset of the bank, as hereinabove more fully set forth. Legal title vests in the trustee of that instrument, and the bank has only a security interest.

Although Petitioner propounds the theory that an injunction or attachment can never issue against a bank under *any circumstances,* the *Earle* case clearly contradicts that theory.

3. The Van Reed Decision.

The last of the three Supreme Court cases relied on by Petitioner is the case of *Van Reed* v. *People's National Bank,* 198 U.S. 554 (1905). In this case, the Plaintiff was a creditor of the bank and commenced an action by levying an attachment of the bank's funds. The court followed the *Mixter* holding that attachments against a national bank were prohibited by 12 U.S.C. §91, whether the banks were solvent or insolvent. That case is distinctly different from the case at hand, as the court was concerned in *Van Reed* with protecting the bank's assets from attachment. Here, there is a converse situation—the court is concerned with protecting the assets of the bank's debtors—the mortgagor-property owner—against improper and unlawful foreclosure by the bank itself.

Respondent respectfully submits that neither of the Supreme Court decisions above cited gives a bank's officers, under the guise that they are protected by the National Bank Act, a license to wrongfully foreclose a citizen's property at their will, or misuse or mistreat a citizen in any other way, and be totally free of injunctive interference by state courts. Neither of the cases extends 12 U.S.C. §91 to mean that a state court cannot interfere by means of injunctive relief when a bank's debtors seek to protect *their own property* from missuse by the bank.

B. The Tennessee Supreme Court Decision Was Eminently Correct in Its Interpretation of the Statute and Application of United States Supreme Court Decisions.

Respondent respectfully takes exception to the statement in Petitioner's brief that the Tennessee Supreme Court ignored "the thrust" of the hereinabove cited United

States Supreme Court decisions, and the implication that the Tennessee Court failed to make a thorough study of the question involved.

The Tennessee Supreme Court recognized in its opinion, as does Respondent, that the lower court case law throughout the country is confused and in conflict on the issue presented before this Honorable Court. (App. 73). The Tennessee Supreme Court, in its decision, looked to the purpose of 12 U.S.C. §91—to secure the *assets* of a national bank for ratable distribution among creditors. The Tennessee Justices determined after careful and extensive research, that this Honorable Court had not extended the *Mixter* rationale to a situation in which a debtor of a national bank sought to protect *his own* property from wrongful seizure and foreclosure. (App. 73).

A quite thorough study and examination of many lower court cases involving the question before this court is found in *Drewes and Co.* v. *Ham and Seymour*, 103 S. 241 (La. 1925). In an in-depth study of Section 91 and numerous cases applying thereto, the court found those cases applying Section 91 to be cases in which the suit and main demand was against the bank as the debtor or obligee (*Drewes*, p. 244). The court found that the injunction in that case was proper. The Tennessee Supreme Court recognized also the obvious and clear distinction between protecting property assets of a bank in order to prevent preferential treatment of creditors and the right of a *debtor* to protection against wrongful seizure of his property. (App. 73).

When Petitioner chose to engage on a large scale basis in mortgage financing of homes and other improvements, it brought into play Tennessee law relating to deeds of trust. Guidelines for public foreclosure sales under deeds

and the injunctions of such sales are established under *Tennessee Code Annotated* 23-2401—23-2404, "Sale Under Trust Deeds and Mortgages." Petitioner seeks to rely on this law to its advantage, and induce the unsuspecting citizen and customer into executing a deed of trust securing his property, but on the other hand, Petitioner says that same unsuspecting citizen cannot stop a wrongful foreclosure by the bank under that same deed of trust. Petitioner asserts the bank can do as it pleases with that customer's property, and the court cannot stop it. Respondent submits that placing the bank in such a frighteningly powerful position was neither the intention of Congress nor of the United States Supreme Court in any of the afore-cited cases.

The Tennessee Supreme Court recognized the dangers of a mortgage-banker being placed in such a position (App. 76), as did the court in *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924). In that case the bank sought to foreclose a chattel mortgage and was proceeding with foreclosure when the mortgagor sought a temporary injunction, alleging a credit due him against the note securing the chattel mortgage. The bank asserted 12 U.S.C.A. §91 as a defense. The court stated in response:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it." p. 205.

III.

THE THEORY ADVANCED BY PETITIONER AS TO THE MEANING OF 12 U.S.C. §91 WOULD EFFECTIVELY DEPRIVE A MORTGAGOR OF HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW.

Amendment 5 of the United States Constitution assures citizens that no person shall be deprived of his property without due process of law.

Respondent does not argue that the National Bank Act is *per se* unconstitutional, because Respondent submits that it does not stand for the proposition that a national bank is immune to injunction against unlawful foreclosure of its debtor's assets. Respondent does argue, however, that the construction placed on the statute by the Petitioner would render it unconstitutional.

To deprive a citizen of the right to protect his property against unreasonable, fraudulent or simply erroneous foreclosure, without benefit of the right to a court hearing before that property is taken, is surely to deprive that individual of his guaranteed right to due process of law. Under Petitioner's interpretation of 12 U.S.C. §91, the bank itself, through one of its officers, makes the sole determination of whether the debtor is in default and based on that determination alone, the debtor's property is foreclosed.

The meaning of due process is clearly that a party whose rights are to be affected is entitled to be heard; that he must be notified of the hearing and that the right to notice and an opportunity to be heard must be granted at a meaningful time and a meaningful manner. *Fuentes* v. *Shevin*, 92 S.Ct. 1983 (1972), 407 U.S. 67, 32 L.Ed.2d 556; *Armstrong* v. *Manzo*, 380 U.S. 545, 85 S.Ct. 1187,

14 L.Ed.2d 62. The hearing required must be a fair one, that is, one before a tribunal which meets at least currently prevailing standards of impartiality. *Kwong Hai Chew* v. *Colding*, N.Y. 1953, 73 S.Ct. 472, 344 U.S. 590. There can, of course, be no impartiality where the trier of fact is the interested, adverse party, and the hearing, even then, is *ex parte*.

Petitioner would, of course, argue that due process is ultimately obtained at the final hearing, and the injured mortgagor can recover in damages. This argument is senseless, as (1) the property is gone and one can seldom, if ever, recover the sentimental, esthetic, or even true monetary value of loss of property, as previously noted, and (2) the Fifth Amendment clearly says *no person shall be deprived of property* without due process of law. It should be borne in mind, that under state law, when that property is sold at foreclosure sale, it is gone. The property owner is *at that point deprived of his property without a hearing* (and far too often even without notice), in direct contradiction of the Fifth Amendment. Due process is simply not met if the property is seized and sold and then one gets a hearing that comes too late.

This court, in the case of *Fuentes* v. *Shevin, supra*, dealt with the constitutionality of certain state replevin statutes which authorized the seizure of property before a final judgment. While we are dealing here with real property rather than personalty and with construction of a federal, rather than a state statute, the principles and issues involved are the same. The court, through Mr. Justice Stewart, held that the prejudgment replevin statute worked a deprivation of property without due process insofar as they denied the right to prior opportunity to be heard before chattels were taken from their possession.

No more effective arguments can be made for the right of a citizen to a notice and hearing before deprivation of his property than those propounded by Mr. Justice Stewart in the *Fuentes* case, *supra*, 92 S.Ct. at p. 1994:

> "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817 (Frankfurter, J., concurring).

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551."

Respondents would also briefly state that an individual is denied equal protection under the law if he can lose his property without a hearing solely because his mortgage is with a national bank, while the next individual, whose mortgage is with a different financial institution, can seek and invoke injunctive relief. While the Fifth Amendment does not contain an equal protection clause such as is provided in the 14th Amendment, the concept of equal protection is, nevertheless, embraced within the due process clause and does forbid discrimination that is so unjustifiable as to be violative of due process. *U. S.* v. *Pipefitters Local Union No. 562*, 402 U.S. 994, 29 L.Ed.2d 160; *Shapiro* v. *Thompson*, 89 S.Ct. 1322, 394 U.S. 618, 22 L.Ed.2d 600; *Sims* v. *Rives*, 1936, 84 F.2d 871, 66 App. D.C. 24, cert. denied 56 S.Ct. 960.

CONCLUSION

Respondents respectfully submit for the reasons hereinabove set forth, that 12 U.S.C. §91 and the United States Supreme Court cases dealing with that statute, do not stand for the proposition that a national bank cannot be temporarily enjoined from wrongful foreclosure of a customer's assets, nor do they stand for the proposition that the officers of a bank replace the judicial system in settling controversies regarding a citizen's rights and his assets. Respondents submit that by virtue of the due process clause of the United States Constitution, that right is left exclusively to the courts of our land.

Respondents further submit that property owned by an individual, but conveyed to a trustee under a deed of trust to secure payment of an indebtedness is not the bank's property within the meaning of 12 U.S.C. §91.

Accordingly, Respondents pray that the decision of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
Counsel for Respondents